



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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Peter F. Kilmartin, Attorney General

October 5, 2015

OM 15-17

Mr. Richard J. Fagnant

Re: **Fagnant v. Woonsocket City Council**

Dear Mr. Fagnant:

The investigation into your Open Meetings Act ("OMA") complaint filed against the Woonsocket City Council ("City Council") is complete. By correspondence dated May 20, 2015, you contend that the City Council violated the OMA during its May 4, 2015 meeting when, under the agenda item "Good and Welfare," members of the City Council began discussing you, yet that topic was not properly advertised.

In response to your complaint, we received a substantive response from the City Council's legal counsel, Michael J. Marcello, Esquire. Attorney Marcello states, in pertinent part:

"Under a long-standing tradition of the City Council, the agenda for regular City Council meetings includes two-agenda items entitled 'Good and Welfare.'

Citizens Good and Welfare provides an opportunity for the public to address the Council on any issue that they feel is appropriate, subject to a five minute limit.

Mr. Fagnant appeared at the May 4, 2015 meeting and addressed the City Council on issues of transparency and open government.

On Item 11 of the agenda for the May 4, 2015 meeting, there is also a section entitled 'Good and Welfare' where members of the City Council have an opportunity to speak.

Generally, Council members use this opportunity to update the citizens as to events happening within the City, issues that they are working on, or to question the Mayor and/or City's directors about department issues.

* * *

[T]he three Council members that are the subject of Mr. Fagnant's complaint used the opportunity to address the growing controversy.

* * *

[A Councilperson] noted that he believes that some of the postings of this particular individual crossed the line. He specifically asked the Solicitor about the possibility of removal of a zoning board member due to the comments. He also noted that when a public official attacks or discriminates or makes comments about certain people, that it crosses the line. He concluded that he was hopeful that 'we can look into this' and he urged his colleagues to consider a resolution. Nowhere in the audio did this Council [member] invoke Mr. Fagnant's name.

[A Councilperson] * * * raised concerns and sought clarity as to what authority, if any, the City Council had to remove a mayoral appointment. The Council [member] and the City Solicitor then got into a general discussion about provisions of the Woonsocket City Charter and the distinction it made between an employee and a public official.

* * *

No action was taken by the City Council as a result of the comments made by these three Council persons and no votes were taken.

* * *

It is the position of the City Council that there is no violation of the OMA because the matters discussed by the Councilpersons were a matter of public record and that such comments were for information purposes only and/or a request for a further follow-up."¹

We acknowledge your rebuttal dated July 14, 2015.

¹ Mr. Marcello also asserts the Speech and Debate Clause of the Rhode Island Constitution is applicable, but no argument is presented concerning how this Clause may be applicable to municipal legislators. See R.I. Const. Art VI, § V ("For any speech in debate in either house, no member shall be questioned in any other place."). Since this argument has not been developed, we decline to further examine it.

The OMA requires all public bodies provide supplemental public notice of all meetings at least forty-eight (48) hours in advance of the meeting. See R.I. Gen. Laws § 42-46-6(b). “This notice shall include the date the notice was posted, the date, time and place of the meeting, and a statement specifying the nature of the business to be discussed.” Id. (Emphasis added). The level of specificity that must be detailed for each agenda item depends on the facts and circumstances surrounding each item.

Before examining what is before this Department, it is helpful to note what is not before this Department. Specifically, you make various representations that the discussion concerning you was slanderous and otherwise illegal and/or improper. This Department expresses no opinion on the nature of the City Council’s speech that preceded this complaint, nor does this Department express any opinion on the nature of your speech, which apparently led the City Council to discuss you, as well as – we are informed – a visit to you by the United States Secret Service. Instead, the sole issue for this Department is whether the agenda item for the May 4, 2015 meeting was sufficient to inform the public of the nature of the business to be discussed. The agenda item at issue for the May 4, 2015 meeting stated, in pertinent part:

“11. GOOD AND WELFARE
(Five minute limit, per Council Rules of Order)”

In Tanner v. Town of East Greenwich, 880 A.2d 784 (R.I. 2005), the Rhode Island Supreme Court examined the OMA’s requirement that a public notice contain “a statement specifying the nature of the business to be discussed.” The Court determined that the agenda item “Interviews for Potential Boards and Commission Appointments” did not adequately apprise the public of the nature of the business to be discussed at a Town Council meeting. Specifically, after conducting interviews as indicated on the notice, the East Greenwich Town Council proceeded to vote to appoint various individuals to the planning and zoning boards for the Town. The Court reasoned that, although the standard is “somewhat flexible,” the contents of the notice “reasonably must describe the purpose of the meeting or the action proposed to be taken.” Id. at 797-98. Although the Court provided no bright line rule regarding the specificity of a posted notice, the Court viewed the “totality of the circumstances” and found that the notice was misleading since it implied that merely “interviews” would be conducted, and that a vote or other action would not take place. The Court also observed “that the OMA places an affirmative duty on the public body to provide adequate notice of meetings.” Id. at 799.

The Court concluded that although the standard is “somewhat flexible,” the contents of the notice “reasonably must describe the purpose of the meeting or the action proposed to be taken.” Id. at 797-98. The Court added that a flexible “approach accounts for the range and assortment of meetings, votes, and actions covered under the OMA, and the realities of local government, while also safeguarding the public’s interest in knowing and observing the workings of its governmental bodies.” Id. at 797. Although the Court provided no bright line rule regarding the level of specificity of a posted notice, the Court determined the appropriate inquiry is “whether the [public] notice provided by the [public

body] fairly informed the public, under the totality of the circumstances, of the nature of the business to be conducted.” Id.

The Rhode Island Supreme Court re-examined the Tanner standard in Anolik v. Zoning Board of Review of the City of Newport, 64 A.3d 1171 (R.I. 2013). The relevant facts of that case are as follows. In November of 2008, defendants received a letter from counsel for Congregation Jeshuat Israel requesting an extension of the time in which to substantially complete certain improvements to Congregation Jeshuat Israel’s property that had been approved by a previous zoning board decision. Id. at 1172. That previous decision expressly contained a condition to the effect that there be substantial completion of the improvements within two years. Id. The agenda item for the February 23, 2009 meeting stated:

“IV. Communications:

Request for Extension from Turner Scott received 11/30/08 Re: Petition of Congregation Jeshuat Israel”

At the meeting, the board voted unanimously to approve the request for an extension of time, which required that the “improvements must be started and [be] substantially complete [by] February 23, 2011.” Id. at 1173. On August 21, 2009, the plaintiffs filed a complaint in Superior Court alleging that the agenda item violated the OMA because it was “a ‘vague and indefinite’ notice to the public and one lacking in specificity.” Id. The Superior Court granted defendants’ motion for summary judgment. Id. On appeal, the Supreme Court looked to Tanner and noted that R.I. Gen. Laws § 42-46-6(b) requires the “public body to provide fair notice to the public under the circumstance, or such notice based on the totality of the circumstances as would fairly inform the public of the nature of the business to be discussed or acted upon.” Id. at 1175 (*quoting*, Tanner, 880 A.2d at 797). The Court held that the agenda item was “completely silent as to which specific property was at issue; the agenda item provided no information as to a street address, a parcel or lot numbers, or even an identifying petition or case number.” Id. (Emphasis in original). The agenda item “fails to provide any information as to exactly what was the reason for the requested extension or what would be its duration.” Id. at 1176.

Similarly, in the instant case, we conclude that the agenda item for the City Council’s May 4, 2015 meeting was “completely silent” as to what was to be discussed. The agenda item, “Good and Welfare” lacked any identifying information concerning the nature of the business to be discussed. Similar to the agenda item in Anolik, the City Council’s May 4, 2015 meeting agenda contained “vague and indefinite notice to the public” and “one lacking in specificity.” It provided the barest of information.² Yet a

² See also Block v. Rhode Island Board of Elections, OM 13-14 (The Board violated the OMA when its agenda item, “[d]iscussion and possible vote in regards to election legislation in the R.I. General Assembly,” lacked any identifying information concerning the election legislation other than it involved legislation pending in the Rhode Island

review of the meeting audio reveals a discussion of several topics, including one concerning the authority, if any, the City Council has to remove a mayoral appointment from office, i.e., you. These discussions under the agenda topic of “Good and Welfare” violated the OMA.

The City Council’s legal counsel indicates that City Council members use the “Good and Welfare” section as an opportunity for them to update citizens as to events happening within the City, issues they are working on, and to question the Mayor and/or the City’s directors about department issues. Attorney Marcello further states that any comments were for informational purposes only and that no action was taken as a result of the comments made by the City Council members and that no vote was taken. While the City Council could have lawfully amended its agenda to add an item for informational purposes only, see R.I. Gen. Laws § 42-46-6(b), no evidence or argument has been presented that the City Council took this avenue. Moreover, while the City Council points to Rhode Island General Laws § 42-46-6(d), this provision states that:

“[n]othing within this chapter shall prohibit any public body, or the members thereof, from responding to comments initiated by a member of the public during a properly noticed open forum even if the subject matter of a citizen’s comments or discussions were not previously posted, provided such matter shall be for informational purposes only and may not be voted on * * *.” (Emphasis added).

Respectfully, the OMA allows members of public bodies to respond to topics not on the agenda during a properly noticed open forum only if initiated by a member of the public, not a member of the public body. See Scungio v. Hopkinton Town Council, OM 07-19. In other words, members of a public body cannot initiate comments not properly advertised. A member of a public body may only respond to topics/comments initiated by a citizen during a properly noticed open forum section.

Upon a finding of an OMA violation, the Attorney General “may file a complaint on behalf of the complainant in the superior court against the public body.” R.I. Gen. Laws § 42-46-8(a). “The court may issue injunctive relief” and/or “may impose a civil fine not exceeding five thousand dollars (\$5,000) against a public body or any of its members” for a willful or knowing violation. R.I. Gen. Laws § 42-46-8(d). In this instance, we find insufficient evidence that the City Council knowingly or willfully violated the OMA. Since the City Council did not take any affirmative action during that portion of the

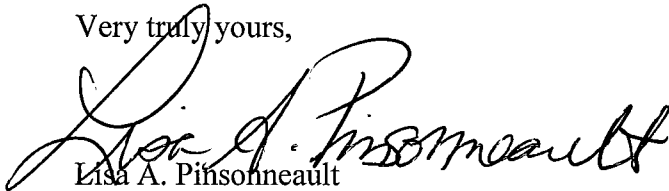
General Assembly); Pinning/ Reilly v. Providence Board of Park Commissioners, OM 07-08 (This Department considered the agenda item “Superintendent’s Report.” In that matter, legal counsel represented that the “report” was simply an opportunity to make the Commissioners aware of various developments in the Parks Department. This Department found that a member of the public would not be fairly informed of the nature of the business to be discussed based only upon the statement, “Superintendent’s Report”).

meeting that could be declared null and void, we also find injunctive relief not appropriate. This finding serves as notice to the City Council that the conduct discussed herein is unlawful and may serve as evidence of a willful or a knowing violation in any similar future situation.

Although the Attorney General will not file suit in this matter, nothing in the OMA precludes an individual from pursuing an OMA complaint in the Superior Court. The complainant may do so within "ninety (90) days of the attorney general's closing of the complaint or within one hundred eighty (180) days of the alleged violation, whichever occurs later." R.I. Gen Laws § 42-46-8. Please be advised that we are closing our file as of the date of this letter.

We thank you for your interest in keeping government open and accountable to the public.

Very truly yours,

A handwritten signature in black ink, appearing to read "Lisa A. Pinsonneault", written over the typed name.

Lisa A. Pinsonneault
Special Assistant Attorney General
Extension 2297

LP/pl

Cc: Michael J. Marcello Esq.